Labor-Management Teams: A Panacea for American Businesses or the Rebirth of a Laborer's Nightmare?

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The concept of a "team" generates revered images of camaraderie, selflessness, and persistence. Yet, lurking below this positive veneer is a core of problematic attributes. The virulence of this core is made visible by the legal controversy surrounding the questionable legality of labor-management teams.[1] This new managerial strategy has been threatened by a rigid interpretation of the National Labor Relations Act ("NLRA") by some courts and the National Labor Relations Board ("NLRB").[2] To promote these allegedly beneficial teams, proponents of the dominant trend in managerial theory—cooperative management—assert the need for a legislative amendment to the NLRA.[3] Opponents of such an amendment fear that a result of the amendment would be the resurrection of the company-dominated union, whose abolition was one of the primary purposes of enacting the NLRA.[4] These opponents contend that the revered characteristics of teams are noticeably absent from labor and management teams.[5]

This Note will evaluate both arguments in an attempt to reach a conclusion about the merits of amending the NLRA. Part I of this Note will examine cooperative management[6] plans in the United States. Part II will explore the history of company unions. Part III will discuss the legislative response to company unions, specifically section 8(a)(2)[7] of the NLRA. Part IV will

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[1] Most labor-management teams share the following characteristics: (1) almost equal numbers of persons from both labor and management, (2) committees that discuss and decide together their priorities, (3) committees chaired by persons from both labor and management who are mutually agreed on and serve usually on a rotating basis, (4) committee meetings that are regularly scheduled or when needed, and (5) input from all members of the committees to ensure that a large number of both management and labor are participating in the problem solving process. *See* Note, *Participatory Management Under Sections 2(5) and 8(a)(2) of the National Labor Relations Act*, 83 MICH. L. REV. 1736, 1739 (1985).

[2] *See, e.g.*, William C. Byham, *Congress Should Strengthen the Corporate Team*, WALL ST. J., Feb. 5, 1996, at A14.

[3] *See id.*; *see also* Gregory J. Hare, *Employee Participation Programs: A Great Idea, But Are They Lawful?*, 1991 DET. C.L. REV. 973, 1017.

[4] *See, e.g.*, H.R. REP. NO. 248, at 29–40 (1995).

[5] *See id.*

[6] Labor-management teams are one form of cooperative management plans.

[7] Section 8(a)(2) states that: "It shall be an unfair labor practice for an employer . . . to dominate or interfere with the formation or administration of any organization or contribute financial or other support to it . . . ." 29 U.S.C. § 158(a)(2) (1982) (The National Relations

analyze the NLRB's decision in *Electromation, Inc.*[8] and its effects on cooperative management plans. Part V will evaluate both labor-management teams and the Teamwork for Employees and Managers Act ("T.E.A.M."),[9] a proposed legislative amendment to the NLRA.

I. COOPERATIVE MANAGEMENT PLANS

A. *The Growth of Cooperative Management Plans*

Cooperative management plans have become increasingly prevalent in American businesses in the past two decades.[10] In 1982, approximately 14% of all corporations and 33% of all corporations with over 500 employees had some form of cooperative management.[11] By 1994, the United States General Accounting Office estimated that this percentage had risen to 80% of all Fortune 500 companies.[12] In fact, "the prevailing management wisdom of the day" views cooperative management plans as the "right" way to build modern organizations.[13]

Act is codified at 29 U.S.C. §§ 151–69 (1982)). Section 2(5) of the NLRA defines a "labor organization" as "any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." 29 U.S.C. § 152(a)(5) (1982).

[8] 309 N.L.R.B. 990, *enforced*, 35 F.3d 1148 (7th Cir. 1994).

[9] *See* H.R. 1529, 103d Cong. (1993).

[10] *See, e.g.*, COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, FACT FINDING REPORT TO U.S. DEP'T OF LABOR AND U.S. DEP'T OF COMMERCE 55 (1994) (estimating that between one-fifth and one-third of the workforce is covered by some form of employee participation); Christopher J. Martin, Electromation *and Its Aftermath*, 19 EMPLOYEE REL. L.J. 133–34 (1993) ("It has been estimated that there may be as many as 30,000 such committees currently in operation, involving as many as 9 million employees at 80 percent of the Fortune 1,000 companies in the United States."); *Labor Statutes Did Not Anticipate Modern Workplaces, Experts Say in Responding to* Electromation *Decision*, 142 Lab. Rel. Rep. (BNA) 161 (Feb. 15, 1993) (citing the comments of Gerald E. Ledford, Jr., senior research scientist at the Center for Effective Organizations at the University of Southern California, that a survey showed that 80% of Fortune 1,000 employers "have some type of employee participation program.").

[11] *See* OFFICE OF ECONOMIC RESEARCH, NEW YORK STOCK EXCHANGE, PEOPLE AND PRODUCTIVITY: A CHALLENGE TO CORPORATE AMERICA 23–24 (1982).

[12] *See* David R. Sands, *Management-Worker Programs Again Face NLRB Challenge*, WASH. TIMES, Dec. 17, 1993, at B11.

[13] If all is not well in your traditionally structured, hierarchical organization, the reason is that there are inherent, irreparable flaws in hierarchical systems that have rendered

The increase in these plans has been justified as a necessary response to intense competitive pressures existing in a globalized economy.[14] Many American businesses point to studies showing a decline in productivity, increased foreign competition, and reports of worker dissatisfaction as motivation to experiment with cooperative management programs.[15]

The basic assumption fueling the increase in these programs is that cooperation based on mutual respect and trust is more beneficial to all parties than confrontation between management and labor.[16] Employers allegedly benefit by increased profits resulting from improved worker productivity[17] and the elimination of mid-level management, whose job was to "pass orders downward."[18] Employees benefit by escaping assignment to repetitive tasks that

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> them obsolete here in the Information Age. Hierarchies are dinosaurs—lumbering, unable to adapt to the pace of change, paralyzed by complexity, and doomed to die.
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> If, on the other hand, your new team-based system is in trouble, the reason is that you are doing something wrong. Teams—preferably self-managing teams—are the right and proper building blocks with which to construct modern organizations. The team concept has no chronic or endemic drawbacks. So you must be flubbing the execution.

Jack Gordon, *The Team Troubles That Won't Go Away*, 31 TRAINING 25 (1994).

[14] *See* COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, *supra* note 10, at 42-45; Martin J. Levine, *Labor and Management Response to Total Quality Management*, 43 LAB. L.J. 107, 108 (1992); Marleen A. O'Connor, *The Human Capital Era: Reconceptualizing Corporate Law to Facilitate Labor-Management Cooperation*, 78 CORNELL L. REV. 899, 901 (1993).

[15] *See* Shaun G. Clarke, Note, *Rethinking the Adversarial Model in Labor Relations: An Argument for Repeal of Section 8(a)(2)*, 96 YALE L.J. 2021, 2021 (1987).

[16] *See* Note, *Labor-Management Cooperative Programs: Do They Foster or Frustrate National Labor Policy?*, 7 HOFSTRA LAB. L.J. 219, 235 (1989).

[17] *See* JERRY L. MCADAMS & ELIZABETH J. HAWK, CAPITALIZING ON HUMAN ASSETS 30 (1992). "Apparently, performance-reward plans are viewed as business strategies, with the expectation that they will contribute to business results." *Id.*; *see also* Kevin C. Naff, *Teams Approach to Credit Management Gaining in Popularity*, 49 BUS. CREDIT 35-36 (1995). While it is attractive to attribute companies' successes to teamwork, those successes may likely result from economic upturns, changes in consumer demand, or any number of other factors.

[18] *The Trouble with Teams*, ECONOMIST, Jan. 14, 1995, at 61.

alienate them[19] and by "feeling that they are shaping their own jobs."[20]

B. *Teams: One Type of Cooperative Management Plan*

Cooperative management programs exist under a myriad of names. Despite the numerous monikers of these cooperative programs, most can be classified into one or more of four broad categories: (1) quality control circles,[21] (2) quality of work-like groups,[22] (3) board of director/upper-level management participation groups,[23] and (4) labor-management work teams ("teams"). While many of the legal problems faced by teams are similarly present when the other three categories of workplace cooperation are implemented, this Note restricts its purview to teams.

Workplace team programs[24] attempt to shift responsibilities for controlling and solving workplace performance problems from managers and supervisors

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[19] *See* BARBARA GARSON, ALL THE LIVELONG DAY at x–xi (1975). The author stated: "Many assembly-line workers deliberately slow their pace from time to time and watch the pieces pile up. Sometimes this is for revenge against the company that 'treats us like machines' [and] 'uses us like tools.'" *Id.*; *see also* Stephen J. Frangos & Steven J. Bennett, *Turnaround at Kodak Park*, 58 BUS. Q. 31–41 (1994); Anita Lienert, *Forging a New Partnership*, MGMT. REV., Oct. 1994, at 39–43.

[20] *The Trouble with Teams*, *supra* note 18, at 61.

[21] The objective of quality control circles is the improvement of both the production process and the quality of the product. The circles are comprised of a group of workers from each department. Circle meetings train workers in quality improvement techniques, with the intention of aiding employees in identifying, analyzing, and solving work-related problems. *See* WILLIAM B. GOULD, JAPAN'S RESHAPING OF AMERICAN LABOR LAW 95 (1984).

[22] Similar to quality control circles, quality of work-like groups are comprised of both employees and management. However, unlike quality control circles, the purpose of quality of work-like groups is to "concentrate on methods of ordering work so that through its execution, workers' needs for fulfillment and personal growth can be met, thereby providing them a self-generated incentive to perform well." Thomas C. Kohler, *Models of Workers Participation: The Uncertain Significance of Section 8(a)(2)*, 27 B.C. L. REV. 499, 506 (1986).

[23] In these groups, union representatives sit on the board of directors of their company and participate as members. *See* Andrew A. Lipsky, Comment, *Participatory Management Schemes, the Law and Workers' Rights: A Proposed Framework of Analysis*, 39 AM. U. L. REV. 667, 674–75 (1990).

[24] The following definition encompasses some of the significant aspects of this concept:

> A self-directed work team is a highly trained group of employees, from 6 to 18, on average, fully responsible for turning out a well-defined segment of finished work. The segment could be a final product, like a refrigerator or ball bearing; or a service, like a fully processed insurance claim. It could also be a complete but intermediate product or

to employees.[25] Two primary types of teams are used. One type of team is the work-unit team, where members of the team create a set of performance measures related to the companies' objectives; then, in partnership with management, goals are developed for performance of those measures.[26] Another type of team is the self-managed team, which creates an organizational structure devoid of the traditional departmentalized structure of many companies.[27]

Regardless of the type of team, several characteristics are inherent in all teams.[28] Typically, the team is responsible for deciding how much work is to be completed and by whom, promoting and disciplining workers in the group, scheduling overtime, and interviewing job applicants.[29] Thus, teams provide workers with greater responsibility than they would otherwise have as individual employees, which supposedly motivates workers to achieve higher levels of performance.[30]

II. COMPANY UNIONS: EMPLOYERS' RESPONSE TO UNIONIZATION

A. *The Rise of Company Unions*

Five decades prior to the advent of cooperative management programs, unions were a thriving employee organization. In the United States, by 1904, membership in trade unions exceeded two million people.[31] This number increased to 3.5 million by 1929.[32] This dramatic increase in union membership

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service, like a finished refrigerator motor, an aircraft fuselage, or the circuit plans for a television set. Because every member of the team shares equal responsibility for this finished segment of work, self-directed teams represent the conceptual opposite of the assembly line, where each worker assumes responsibility for a narrow technical function.

J. ORSBURN ET AL., SELF-DIRECTED WORK TEAMS: THE NEW AMERICAN CHALLENGE 8 (1990).

[25] *See* JOSEPH H. BOYETT & HENRY P. CONN, WORKPLACE 2000: THE REVOLUTION RESHAPING AMERICAN BUSINESS 238 (1991).

[26] *See id.*

[27] *See id.* at 239.

[28] *See supra* note 1.

[29] *See* ORSBURN, *supra* note 24, at 9.

[30] *See id.*

[31] *See* M. DERBER, THE AMERICAN IDEA OF INDUSTRIAL DEMOCRACY 1865-1965 at 114-15 (1970).

[32] *See id.* at 175, 203. The primary cause of this increase in union membership was the increase in production necessary for World War I. *See id.*

provided unions, for the first time, with the power to challenge management's domination over the labor-management relationship.[33]

However, management did not stand idly by as the power shifted. Rather, management devised two primary methods to counteract the union movement. First, following the lead of the National Association of Manufacturers, many companies joined the "open shop" movement.[34] This movement's foundation was established by disseminating anti-union propaganda, while simultaneously creating the appearance of attempting to protect workers' rights and freedom of choice.[35]

A second response to the increasing power of unions, and a primary focus of this Note, was the creation of company unions.[36] A company union is an organization that represents employees, but which lacks true independence, and also owes a dual obligation to the employer and its employees.[37] By 1935, 60% of all trade union workers were members of company unions.[38] These unions, referred to as sham unions,[39] were created and dominated by management.[40] Thus, company unions differed significantly from other unions in many important ways: membership was mandatory and restricted to the employees of only a single employer, management provided the union with its financial support, outside union negotiators were not included, and the employer had

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[33] *See* Edward M. Dicato, *Employee Involvement Teams Under the National Labor Relations Act: Do They Inherently Conflict?*, 1990 DET. C.L. REV. 691, 693.

[34] *See* Kohler, *supra* note 22, at 519.

[35] *See id.*

[36] These entities had many names such as "work councils" or "grievance committees," although the common term used was "company unions." *See* Clarke, *supra* note 15, at 2023 n.11.

[37] One Senator defined a company-dominated union as an organization

> initiated and created by the employer, in which the employer participates in its administration and operations, in which he is represented on all the committees, and either supervises, initiates, or participates in the decisions or exercises a veto power over them, in which the employer can veto all proposals for amendments in the organic charter of the organization, and in which he provides the organization with financial aid and comfort.

79 CONG. REC. 2332, 2336 (1935), *reprinted in* 2 NLRA, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 2439 (1959) [hereinafter NLRA HISTORY].

[38] *See* Douglas Zucker & Pamela Davis-Clarke, *Employer-Sponsored Programs Skirt NLRA Line*, N.J. L.J., July 5, 1993, at 10.

[39] *See* Audrey Anne Smith, *The Future of Labor-Management Cooperation Following* Electromation *and* E.I. du Pont, 35 SANTA CLARA L. REV. 225 (1994).

[40] *See* Clarke, *supra* note 15, at 2023.

broad discretion in deciding how much value should be given to the input from the company union.[41]

B. *The Problem with Company Unions*

Because management both created and financed company unions, management had carte blanche in selecting the employees' representatives, writing the union's bylaws, and determining the union's structure, operating procedures, and purpose.[42] Similarly, management possessed the unilateral ability to terminate the existence of such company unions at its pleasure.[43] As Senator Wagner of New York said, "The company union is generally initiated by the employer; it exists by his sufferance; its decisions are subject to his unimpeachable veto."[44]

Given these characteristics of a company union, company unions were little more than a puppet of management "masquerading" as a legitimate union.[45] Thus, Senator Wagner believed that the company-dominated union was the greatest obstacle to collective bargaining[46] and genuine freedom of self-organization.[47] Many believed, as Senator Wagner did, that company unions were "the substitute for and the shield against the regular trade union."[48]

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[41] *See id.*

[42] *See* H.R. REP. No. 248, at 35 (1995).

[43] *See id.*

[44] 78 CONG. REC. 4229, 4230 (1934).

[45] According to Senator Wagner, a company union was "a masquerade type of union which is really the creature of the employer rather than the representative of the employee." 79 CONG. REC. 6183, 6184 (1935), *reprinted in* NLRA HISTORY, *supra* note 37, at 2283. For a discussion on the "masquerade theory," see Bureau of Labor-Management Relations and Cooperative Programs, U.S. Dep't of Labor, *U.S. Labor Law and the Future of Labor Management Cooperation*, 33 Daily Lab. Rep. (BNA) D-1, at 33-57 (Feb. 20, 1987).

[46] *See* 78 CONG. REC. 3443, 3443 (1934), *reprinted in* 1 NLRA, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 15-16 (1959) [hereinafter LEG. HIST.] (comments by Sen. Wagner).

[47] *See Labor Disputes Act: Hearings Before the House Committee on Labor on H.R. 6288*, 74th Cong., 14 (1935), *reprinted in* NLRA HISTORY, *supra* note 37, at 2488 (testimony of Sen. Wagner).

[48] *See* CLYDE W. SUMMERS & HARRY H. WELLINGTON, CASES ON LABOR LAW 585 (2d ed. 1982), *quoted in* William E. Fulmer & John J. Coleman, Jr., *Do Quality-of-Work-Life Programs Violate Section 8(a)(2)?*, 35 LAB. L.J. 675, 676 (1984).

III. THE NLRA: A LEGISLATIVE RESPONSE TO COMPANY UNIONS

A. *An Attempt to Eliminate Company Unions*

As a method of forcing management to release this "shield against the regular trade union,"[49] Senator Wagner of New York introduced S. 2926,[50] entitled the "Labor Disputes Act,"[51] which later became the NLRA.[52] The NLRA was designed to provide employees a "voice" through an independently

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[49] *Id.*

[50] S. 2926, 73d Cong. (1934).

[51] *Id.* at § 1.

[52] 29 U.S.C. §§ 151-69 (1988). The 1935 NLRA was enacted by Congress to promote a peaceful relationship between unions and management, though some commentators have described this relationship as being formed by a shotgun wedding. *See* CHARLES O. GREGORY & HAROLD A. KATZ, LABOR AND THE LAW 225 (3d ed. 1979). The NLRA protected the rights of employees to organize and bargain collectively through their independently selected representatives; employers, under the Act, were required to recognize and bargain with the employees' representatives. Before passage of the NLRA, employee attempts to unionize were met with great resistance by employers; similarly, courts deemed concerted activities (strikes, picketing, boycotts, etc.) of workers as a conspiracy. *See* FOSTER R. DULLES & MELVYN DUBOFSKY, LABOR IN AMERICA 242 (4th ed. 1984).

The congressional policy underlying the enactment of the NLRA was discussed in 29 U.S.C. § 151 (1940) which states:

> The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce.
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> . . . The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized . . . substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depression.
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> . . . Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and restoring equality of bargaining power between employers and employees.

29 U.S.C. § 151 (1940).

selected outside representative, who would serve as a bargaining representative in discussions with management.[53] Senator Wagner believed that a freely selected outside representative was fundamental if workers were to effectively exercise their voice in economic affairs. He believed this autonomous selection of a bargaining representative was fundamental for several reasons. First, due to the worker's asymmetrical knowledge of the labor market and general business conditions (*e.g.*, wages, hours), any attempt to secure legitimately beneficial opportunities through bargaining with the better-informed management would be futile.[54] Second, bargaining in a subservient role, as workers' representatives were forced to do as members of company unions, prevents the representative from freely bargaining without fear of reprisals.[55] As Senator Wagner noted, "[O]nly representatives who are not subservient to the employer with whom they deal can act freely in the interest of employees. Simple common sense tells us that a man does not possess this freedom when he bargains with those who control his source of livelihood."[56] Thus, Senator Wagner concluded that "the very first step toward genuine collective bargaining is the abolition of the employer-dominated union as an agency for dealing with grievances, labor disputes, wages, rules, or hours of employment."[57]

B. *Section 2(5) and Its Judicial Interpretation*

The term "labor organization" is defined broadly in section 2(5) of the NLRA as: "any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."[58] Thus, an employee group may be considered a "labor organization" in three ways: by its form or structure, by the subject matter it covers, and by the function it serves.[59]

The seminal case interpreting the definition of a labor organization is *NLRB v. Cabot Carbon Co.*[60] In that case, the Supreme Court held, based on its

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[53] *See* S. 2926, 73d Cong. §§ 4, 5, 207 (1934), *reprinted in* LEG. HIST., *supra* note 46, at 3–4, 11.

[54] *See* 78 CONG. REC. 3443 (1934), *reprinted in* LEG. HIST., *supra* note 46, at 15–16.

[55] *See id.*

[56] *Id.* at 16.

[57] *Id.*

[58] 29 U.S.C. § 152(5) (1984).

[59] *See* John Schmidman & Kimberlee Keller, *Employee Participation Plans as Section 8(a)(2) Violations*, 35 LAB. L.J. 772, 773 (1984).

[60] 360 U.S. 203 (1959).

interpretation of section 2(5), that the committees established by the employer were in fact "labor organizations," as defined by section 2(5).[61] In *Cabot Carbon Co.*, committees were established at all of the employer's plants.[62] The bylaws, drafted in collaboration with employee representatives, suggested that the purpose of the committees was to establish a mechanism whereby suggestions from employees and problems between labor and management could be discussed.[63] However, labor and management's discussions exceeded the anticipatory topics and instead covered almost all topics that concerned the employer-employee relationship.[64] Thus, because the employees were charged no dues and the employer paid all of the committees' expenses,[65] the NLRB found that not only were the committees "labor organizations," but also that the committees were "dominated, interfered with, and supported" by the company in violation of section 8(a)(2).[66]

However, the United States Court of Appeals for the Fifth Circuit set aside the NLRB's order claiming that the phrase "dealing with" in section 2(5) is synonymous with "bargaining with."[67] Consequently, the court held, because there was no "bargaining" occurring in these committees, the committees were not "labor organizations."[68]

The Supreme Court reversed after deciding that the plain language of the statute and the legislative history indicated that the term "dealing with" should not be granted such a narrow interpretation.[69] Instead, the Supreme Court believed that "labor organizations" should be defined broadly to include employee committees where discussions of the subjects mentioned in section 2(5) occur.[70] Thus, the Supreme Court held that because the topics discussed in

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[61] *See id.* at 214–15, 218.

[62] *See id.* at 205.

[63] *See id.* Such problems of mutual interest were: "safety; increased efficiency and production; conservation of supplies, materials, and equipment; encouragement of ingenuity and initiative; and grievances at nonunion plants or departments." *Id.* at 205 n.2.

[64] *See id.* at 207–08. Examples included "seniority, job classifications, job bidding, makeup time, overtime records, time cards, a merit system, wage correction, working schedules, holidays, vacations, sick leave, and improvement of working facilities and conditions." *Id.* at 207.

[65] *See id.* at 209.

[66] *See id.* at 209–10.

[67] *See id.* at 210.

[68] *See id.*

[69] *See id.* at 210–11. For the Court's discussion of the legislative history behind Congress' adoption of the term "dealing" rather than "bargaining collectively," see *id.* at 210–12.

[70] *See id.* at 211.

the committees were directly related to the subjects mentioned in section 2(5), the committees were in fact labor organizations.[71]

C. *Section 8(a)(2) and Its Judicial Interpretation*

As mentioned above, two elements must be present for section 8(a)(2) to be violated. First, under section 2(5) there must be an entity deemed a "labor organization." Second, under section 8(a)(2) the labor organization must be dominated by, interfered with, or financed by the employer.[72] By prohibiting the employer from interfering with, supporting, or dominating employee labor organizations, this section ensures that the entities participating in collective bargaining on behalf of employees will be autonomous.[73] Thus, as evidenced by the enactment of this provision, Congress recognized that legitimate collective bargaining could only occur if the employer was prohibited from sitting on both sides of the bargaining table.[74] As Senator Wagner stated, "Collective bargaining becomes a mockery when the spokesman of the employee is the marionette of the employer."[75]

After an entity has been deemed a section 2(5) "labor organization," section 8(a)(2) is violated only if the employer has unlawfully dominated, assisted, or financially supported the labor organization.[76] Judicial inquiry into whether a section 8(a)(2) violation has occurred usually centers around several factors. Evidence of a violation of section 8(a)(2) includes: the creation of a labor organization,[77] aiding its formation,[78] providing financial assistance,[79]

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[71] *See id.* at 213–14. For the Court's discussion of the legislative history behind the inclusion of employee committees within the definition of "labor organization," see *id.* at 214–18.

[72] *See supra* note 7.

[73] *See* 78 CONG. REC. 3678–79 (1934), *reprinted in* LEG. HIST., *supra* note 46, at 18–19.

[74] *See Labor Disputes Act: Hearings on H.R. 6288 Before the Committee on Labor*, 74th Cong., 15 (1935), *reprinted in* NLRA HISTORY, *supra* note 37, at 2489 (Senator Wagner argues that "[c]ollective bargaining becomes a sham when the employer sits on both sides of the table or pulls the strings behind the spokesman of those with whom he is dealing.").

[75] 79 CONG. REC. 7565, 7570 (1935), *reprinted in* NLRA HISTORY, *supra* note 37, at 2334.

[76] *See* 29 U.S.C. § 158(a)(2) (1982).

[77] *See, e.g.*, NLRB v. Pennsylvania Greyhound Lines, Inc., 303 U.S. 261, 270 (1938) (holding that creation of a company union violated § 8(a)(2)).

[78] *See, e.g.*, Horne, 61 N.L.R.B. 742, 752 (1945) (holding that the drafting of a charter and bylaws that started a union constituted an unfair labor practice).

[79] *See, e.g.*, Camvac Int'l, Inc., 288 N.L.R.B. 816, 847 (1988) (stating the fact that employees were paid for attendance at meetings, and the fact that the personnel director

allowing the use of company facilities,[80] and aiding a particular union.[81] However, standing alone, the aforementioned acts by an employer are considered "friendly cooperation"; consequently, these isolated employer acts do not violate section 8(a)(2).[82] Although if these acts are coupled with other acts, unlawful assistance, dominance, and support may be found.[83]

Also, the mere potential for domination, without actual evidence of such, will not violate section 8(a)(2).[84] However, when a labor organization has no life of its own, but is instead completely dependent on the employer for its existence or when management has the power to eliminate or change the organization at will, domination will be found.[85]

In *NLRB v. Newport News Shipbuilding & Drydock Co.*,[86] the Supreme Court, in determining whether a company interfered with, dominated, or unlawfully supported the organization, clearly stated that this determination rests solely on objective acts.[87] Thus, the motivation behind certain acts by

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recorded committee minutes, were evidence of employer domination); Comet Corp., 261 N.L.R.B. 1414, 1447 (1982) (holding that paying employees for meeting on company property and time, coupled with the company providing clerical assistance, indicates domination by employer).

[80] *See, e.g.*, Dennison Mfg. Co., 168 N.L.R.B. 1012, 1015–16 (1967) (providing office facilities constitutes unlawful support); Nutone, Inc., 112 N.L.R.B. 1153, 1170–71 (1955) (holding that employer's providing company paper and copying equipment is illegal support); Shell Oil Co., 2 N.L.R.B. 835, 847, 853 (1937) (holding that employer's providing company time, company trucks, and company telephones was illegal support).

[81] *See, e.g.*, NLRB v. Daylight Grocery Co., 345 F.2d 239 (5th Cir. 1965) (holding that an employer's anti-union campaign against one particular union, which resulted in the formation of a company union, was an unfair labor practice).

[82] *See* Hertzka & Knowles v. NLRB, 503 F.2d 625, 629–31 (9th Cir. 1974).

[83] *See* NLRB v. Newport News Shipbuilding & Drydock Co., 308 U.S. 241, 250–51 (1939); NLRB v. Pennsylvania Greyhound Lines, 303 U.S. 261, 268–69 (1938); NLRB v. Ampex Corp., 442 F.2d 82, 85 (7th Cir. 1971).

[84] *See* Duquesne Univ. of the Holy Ghost, 198 N.L.R.B. 891, 892 (1972); *see also* NLRB v. Homemaker Shops, Inc., 724 F.2d 535, 545 (6th Cir. 1984) ("It is not the *potential* for employer control, but rather the *reality* thereof, that is the key element of a true case of unlawful domination or assistance."); Chicago Rawhide Mfg. Co. v. NLRB, 221 F.2d 165, 167–68, 170 (7th Cir. 1955).

[85] *See* Electromation, Inc., 309 N.L.R.B. 990, 995 (1992), *enforced*, 35 F.3d 1148 (7th Cir. 1994). The Board held that "a labor organization that is the creation of management, whose structure and function are essentially determined by management . . . and whose continued existence depends on the fiat of management, is one whose formation or administration has been dominated under Section 8(a)(2)." *Id.*

[86] 308 U.S. 241 (1939).

[87] *See Newport News*, 308 U.S. at 251. The unanimous Court stated that "[i]n applying the statutory test of independence it is immaterial that the plan had in fact not engendered, or

management that may constitute illegal dominance, interference or support is irrelevant.[88]

D. *Traditional Analysis Under Attack*

The aforementioned traditional analysis that many courts apply when determining (1) whether a section 2(5) labor organization exists and (2) whether the labor organization, under section 8(a)(2) has been unlawfully dominated, interfered with, or financially supported by the company has come under frequent attacks by some courts and the NLRB.[89] Commentators, along with

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indeed had obviated, serious labor disputes in the past, or that any company interference in the administration of the plan had been incidental . . . and with good motives." *Id.*

[88] *See id.*

[89] *See, e.g.*, Airstream, Inc. v. NLRB, 877 F.2d 1291 (6th Cir. 1989); NLRB v. Streamway Div. of Scott & Fetzer Co., 691 F.2d 288, 292–93 (6th Cir. 1982) (holding that "not all management efforts to communicate with employees concerning company personnel policy are forbidden on pain of violating the Act"; "[a]n overly broad construction of the statute would be as destructive of the objects of the Act as ignoring the provisions entirely"; "[o]ur circuit is willing to reject a rigid interpretation of the statute and instead consider whether the employer's behavior fosters employee free expression and choice"); NLRB v. Northeastern Univ., 601 F.2d 1208, 1214 (1st Cir. 1979) (stating that new changes in labor-management relations indicate a need for "cooperative employer-employee arrangements as alternatives to the traditional adversary model"); Hertzka & Knowles v. NLRB, 503 F.2d 625, 629–30 (9th Cir. 1974) (stating that "[c]entral to the National Labor Relations Act is the facilitation of employee free choice and employee self-organization"; "[section] 8(a)(2) is, in part, a means to that end, for it seeks to permit employees to freely assert their demands for improvements in working conditions"; "almost any form of employer cooperation . . . could be deemed 'support' or 'interference'"; "such a myopic view of § 8(a)(2) would undermine its very purpose and the purpose of the Act as a whole—fostering free choice—because it might prevent the establishment of a system the employees desired"; "the literal prohibition of [section] 8(a)(2) must be tempered by recognition of the objectives of the NLRA"); Modern Plastics Corp. v. NLRB, 379 F.2d 201 (6th Cir. 1967); NLRB v. Walton Mfg. Co., 289 F.2d 177 (5th Cir. 1961). In his dissenting opinion in *Walton Mfg. Co.*, Judge Wisdom stated:

> To my mind an inflexible attitude of hostility toward employee committees defeats the Act. It erects an iron curtain between employer and employees, penetrable only by the bargaining agent of a certified union, if there is one, preventing the development of a decent, honest, constructive relationship between management and labor. . . . There is nothing in Cabot Carbon, or in the Labor-Management Act, or in any other law that makes it wrong for an employer "to work together" with employees for the welfare of all.

these courts, see this traditional and purportedly restrictive analysis as an impediment to cooperative ventures between labor and management, such as teams.[90] Thus, these courts have responded by narrowing the scope of sections 2(5) and 8(a)(2) and limiting the application of *Newport News* and *Cabot Carbon Co.*

Some decisions have held that challenged committees are not section 2(5) "labor organizations" because the committees did not "deal" with management.[91] The NLRB has held that employees who do not stand in an "agency relationship to a larger body" can "deal" on behalf of only their own interests.[92] Thus, following this analysis, employees, who are members of plantwide teams, engage in only individual dealing with the company.[93] Similarly, according to this line of reasoning, when the entire workforce is part of a committee, nobody is representing anyone.[94]

Also in an attempt to narrow the scope of section 2(5), the NLRB has held that activities of certain committees do not rise to the level of "dealing" with management.[95] For example, management-appointed grievance committees in a

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Walton Mfg. Co., 289 F.2d at 182; *see also* Chicago Rawhide Mfg. Co. v. NLRB, 221 F.2d 165 (7th Cir. 1955) (applying an actual, rather than potential, domination test).

[90] *See, e.g.*, Peter F. Drucker, *Are Unions Becoming Irrelevant?*, WALL ST. J., Sept. 22, 1982, at 30.

[91] *See, e.g.*, Sparks Nugget, Inc., 230 N.L.R.B. 275, 276 (1977), *enf'd in part sub nom.* NLRB v. Silver Spur Casino, 623 F.2d 571 (9th Cir. 1980) (holding that "the Employees' Council performs a purely adjudicatory function and does not interact with management for any purpose or in any manner other than to render a final decision on the grievance"; "[t]herefore, it cannot be said that the Employees' Council herein 'deals with' management"); *see also* Mercy-Memorial Hosp., 231 N.L.R.B. 1108 (1977).

[92] *See* General Foods Corp., 231 N.L.R.B. 1232, 1234 (1977). The Board stated that when there is no agency relationship, "all that can come into being is a staff meeting or the factory equivalent thereof . . . . No team [in this case] had a team spokesman." *Id.* at 1234–35.

However, while the Board may have correctly decided this case, it overlooked the many examples where individual workers have been found to be acting on behalf of others when the others were not even involved in the situation. *See* NLRB v. City Disposal Sys., Inc., 465 U.S. 822 (1984). In this case, the Court stated that "the term 'concerted activit[y]' is not defined in the Act, but it clearly enough embraces the activities of employees who have joined together in order to achieve common goals." *Id.* at 830.

[93] *See* General Foods Corp., 231 N.L.R.B. 1232 (1977).

[94] *See id.*

[95] *See, e.g.*, E.I. duPont de Nemours & Co., 311 N.L.R.B. 893, 894 (1993) (finding that "brainstorming" groups involving all plant employees did not "deal with" management because no proposals were made or adopted); Sears, Roebuck & Co., 274 N.L.R.B. 230, 244 (1985) (relying on *Mercy-Memorial Hospital* to find that the communications committee created by management was not a statutory labor organization because it was "used as a

nonunion setting have been held by the NLRB as not dealing with management.[96] Rather, the NLRB has held that the grievance committee serves a statutorily protected "purely adjudicatory function."[97]

Furthermore, to narrow the scope of section 8(a)(2), several courts of appeals have adopted a test of actual, rather than potential, domination, thus following the line of reasoning of the Seventh Circuit in *Chicago Rawhide Manufacturing Co. v. NLRB*.[98] The First,[99] Sixth,[100] and Ninth[101] Circuits have advanced this line of reasoning further by requiring that the employees subjectively view the company-sponsored organization as impeding their independence. Also important to these courts is whether the employer has an anti-union animus, even though the Supreme Court in *Newport News*,[102] expressly held that the existence of anti-union animus is irrelevant when determining whether an organization has been unlawfully dominated.[103]

V. *ELECTROMATION, INC.*[104]

A. *The Facts*

Despite a myriad of decisions interpreting sections 2(5) and 8(a)(2), prior to the 1992 decision in *Electromation, Inc.*, the NLRB had not made a bright line ruling on which functions of cooperative management programs would violate

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management tool that was intended to increase company efficiency" and not as "an employee representative or advocate"); Mercy-Memorial Hosp., 231 N.L.R.B. 1108 (1977) (finding that an employer sponsored grievance committee was not a statutory labor organization because the committee merely "gave employees a voice" in the process, and the personnel manager had the final authority over any resolution); Sparks Nugget, Inc., 230 N.L.R.B. 275, 276 (1977) (finding that a employer sponsored and dominated grievance committee does not "deal with" management but rather "performs purely adjudicatory functions" delegated to it by management).

[96] *See Sears, Roebuck & Co.*, 274 N.L.R.B. at 240–44; *Mercy-Memorial Hosp.*, 231 N.L.R.B. at 1108; *Sparks Nugget, Inc.*, 230 N.L.R.B. at 275, 276.

[97] *See Sparks Nugget, Inc.*, 230 N.L.R.B. at 276; *see also Mercy-Memorial Hosp.*, 231 N.L.R.B. at 1108–09.

[98] 221 F.2d 165 (7th Cir. 1955).

[99] *See* NLRB v. Northeastern Univ., 601 F.2d 1208 (1st Cir. 1979).

[100] *See* Airstream, Inc. v. NLRB, 877 F.2d 1291 (6th Cir. 1989); NLRB v. Streamway Div. of Scott & Fetzer Co., 691 F.2d 288 (6th Cir. 1982); Modern Plastics Corp. v. NLRB, 379 F.2d 201 (6th Cir. 1967).

[101] *See* Hertzka & Knowles v. NLRB, 503 F.2d 625 (9th Cir. 1974).

[102] NLRB v. Newport News Shipbuilding & Drydock Co., 308 U.S. 241 (1939).

[103] *See id.* at 250–51.

[104] 309 N.L.R.B. 990 (1992).

the NLRA. Thus, those companies that were either contemplating or already using these programs were anxiously awaiting the NLRB's decision in *Electromation, Inc.* This case determinatively answered two lingering questions. First, "when does an employee committee lose its protection as a communication device and become a labor organization?"[105] Second, "what employer conduct constitutes domination, assistance, or interference with the employee committee?"[106]

In this case, a manufacturing employer reduced employee benefits in 1988 after sustaining financial losses.[107] In response, sixty-eight employees signed a petition expressing displeasure concerning the reduced benefits.[108] Company President John Howard attempted to assuage the workers' unhappiness by establishing five "action committees."[109] The company not only determined the composition of the committees, it also established the committees' agendas.[110] The company's benefits manager envisioned the committees as a forum where "employee members on the Committees would 'kind of talk back and forth' with the other employees in the plant, get their ideas, and . . . ensure that 'anyone [who] wanted to know what was going on . . . could go to these people.'"[111]

B. *The NLRB's Ruling*

After an administrative law judge found that the action committees were labor organizations dominated and assisted by the company,[112] Electromation, Inc. appealed the decision to the NLRB on the grounds that the committees were not labor organizations.[113] The NLRB began its decision by looking at the statutory language of sections 2(5) and 8(a)(2).[114] However, after determining that the language was ambiguous, the NLRB looked to the legislative history to ascertain the NLRA's purpose.[115] The NLRB, after examining the legislative

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105 *Id.* at 990–91.

106 *Id.*

107 *See id.*

108 *See id.*

109 *See id.*

110 *See id.* Each committee included six volunteer employees and two managers.

111 *Id.* at 991.

112 *See id.* at 990, 1015–33.

113 *See id.*

114 *See id.* at 992–93.

115 "Here, we cannot properly limit our analysis to the statutory language because the terms are not all self-defining." *Id.* at 992.

history, determined that the relevant provisions' purpose was to eliminate the company-dominated unions.[116]

After its analysis of the NLRA's legislative history, the NLRB proceeded to establish a four-part test[117] to determine whether a section 2(5) "labor organization" exists. According to the NLRB's test, a section 2(5) labor organization exists if: (1) employees participate, (2) the organization exists, at least in part, for the purpose of dealing with employers, (3) these dealings concern conditions of work or other statutory subjects, and (4) the organization has as a purpose the representation of employees.[118] The NLRB stressed that any group could be a section 2(5) "labor organization" despite a lack of formal structure, no elected officers, no constitution or bylaws, no regularly scheduled meetings, and no dues.[119]

Following the reasoning of the United States Supreme Court in *Cabot Carbon Co.*[120] and applying its test to the facts of the case, the NLRB held that the committees were section 2(5) "labor organizations" because: (1) employees participated in the committees, (2) the activities of the committee constituted "dealing with" the employer, (3) the committees discussed conditions of employment, such as attendance and employee compensation, and (4) the employee committee members acted as a representative of all employees there.[121]

Also, the NLRB held that the employer's creation of "action committees" designed to allow both management and labor to discuss absenteeism, no-smoking policies, and pay progression plans violated section 8(a)(2).[122] The NLRB ruled that the employer dominated the committees in violation of section 8(a)(2) by supplying the idea for the committees and by determining their structure and objectives.[123] Additionally, the NLRB ruled that the employer unlawfully provided financial support to the committees by allowing the employees to attend committee meetings while being paid.[124]

In addition, the NLRB rejected the idea that anti-union animus should be required to find that an action committee, and similar entities, have been

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116 "The legislative history reveals that the provisions outlawing company dominated labor organizations were a critical part of the Wagner Act's purpose of eliminating industrial strife . . . ." *Id.*

117 *See id.* at 996.

118 *See id.*

119 *See id.*

120 Cabot Carbon Co. v. NLRB, 360 U.S. 203 (1959).

121 *See Electromation, Inc.*, 309 N.L.R.B. at 996–98.

122 *See id.*

123 *See id.*

124 *See id.*

unlawfully dominated in violation of section 8(a)(2).[125] Finally, the NLRB stressed that "a labor organization that is the creation of management, whose structure and function are essentially determined by management . . . and whose continued existence depends on the fiat of management, is one whose formation or administration has been dominated under section 8(a)(2)."[126]

C. *The Seventh Circuit's Decision*

Despite vehement argument from American business leaders that the decision would render most cooperative management programs illegal, the Seventh Circuit adhered to the legislative intent behind the NLRA and affirmed the NLRB's decision.[127] The court stated that the NLRB in,

> exercising its discretion to construe the Act in light of the legislative history, applicable Supreme Court precedent, and the underlying policies of the Act, . . . found that the company's actions here fell within the statutory proscriptions and did not implicate changing industrial realities that might be relevant to construction of the statute in other circumstances.
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> . . . Instead, it simply observed that it does not have latitude to change a particular construction of the statute based on changing industrial realities where congressional intent to the contrary is absolutely clear, or where the Supreme Court has decreed that a particular reading of the statute is required, or both. Nor was it necessary to do so in this case.[128]

D. Electromation, Inc.*'s Perceived Effects: Myth or Reality?*

Despite claims from companies with cooperative management programs in place that the *Electromation, Inc.* decision would render such programs illegal under the NLRA, this result is dubious. As Professor Morris wrote, *Electromation, Inc.* is a case "more significant for its hype than its type."[129] As the Seventh Circuit made clear, its ruling "does not foreclose the lawful use of legitimate employee participation organizations, especially those which are independent, which do not function in a representational capacity, and which focus solely on increasing company productivity efficiency, and quality control."[130] Thus, the *Electromation, Inc.* ruling is a narrow one, applying only

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[125] *See id.*

[126] *Id.* at 995.

[127] *See* Electromation, Inc. v. NLRB, 35 F.3d 1148 (7th Cir. 1994).

[128] *Id.* at 1157.

[129] Charles J. Morris, *Deja Vu and 8(a)(2)—What's Really Being Chilled by* Electromation, 4 CORNELL J.L. & PUB. POL'Y 25, 25 (1994).

[130] *Electromation, Inc.*, 35 F.3d at 1153.

to employer-created and controlled employee committees that discuss wages and working conditions. As Edward Miller, former Chairman of the NLRB, stated, the assertion that *Electromation, Inc.* was the death knell for employee involvement is a "myth"; it "is indeed possible to have effective programs . . . without the necessity of any changes in current law."[131]

V. T.E.A.M.: A CRITIQUE

Despite this myth of *Electromation, Inc.*'s chilling effect on cooperative relations between management and labor, in 1995 Representative Steve Gunderson (R-WI) submitted to the House H.R. 743, the Teamwork for Employees and Managers Act.[132] Gunderson's proposal explicitly recognized

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[131] *Myths and Reality About U.S. Labor Relations: Before the Commission on the Future of Worker-Management Relations*, 201 Daily Lab. Rep. (BNA) D-7, at 1 (Oct. 20, 1993).

[132] H.R. 743, 104th Cong. (1995). The full text of the Bill is as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SEC. 1. SHORT TITLE.

This Act may be cited as the "Teamwork for Employees and Managers Act of 1993."

SEC. 2. FINDINGS AND PURPOSES.

(a) Findings—Congress finds that—

(1) the escalating demands of global competition have compelled an increasing number of employers in the United States to make dramatic changes in workplace and employer-employee relationships;

(2) such changes involve an enhanced role for the employee in workplace decisionmaking, often referred to as "employee involvement," which has taken many forms, including self-managed work teams, quality-of-worklife, quality circles, and joint labor-management committees;

(3) employee involvement structures, which operate successfully in both unionized and nonunionized settings, have been established by over 80 percent of the largest employers in the United States and exist in an estimated 30,000 workplaces;

(4) in addition to enhancing the productivity and competitiveness of businesses in the United States, employee involvement programs have had a positive impact on the lives of such employees, better enabling them to reach their potential in the workforce;

(5) recognizing that foreign competitiors have successfully utilized employee involvement techniques, Congress has consistently joined business, labor and academic

the alleged need for labor-management cooperation.[133] This Act would amend, rather than revise, section 8(a)(2) to allow for companies to create management

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leaders in encouraging and recognizing successful employee involvement programs in the workplace through such incentives as the Malcolm Baldrige National Quality Award;

(6) employers who have instituted legitimate employee involvement programs have not done so to interfere with the collective bargaining rights guaranteed by the labor laws, as was the case in the 1930's when employers established deceptive sham "company unions" to avoid unionization; and

(7) employee involvement is currently threatened by interpretations of the prohibition against employer-dominated "company unions."

(b) Purposes—The purpose of this Act is to—

(1) protect legitimate employee involvement programs against governmental interference;

(2) preserve existing protections against deceptive, coercive employer practices; and

(3) permit legitimate employee involvement structures, where workers may discuss issues involving terms and conditions of employment, to continue to evolve and proliferate.

SEC. 3. ADMENDMENT TO SECTION 8(a)(2) OF THE NATIONAL LABOR RELATIONS ACT.

Section 8(a)(2) of the National Labor Relations Act (29 U.S.C. § 158(a)(2)) is amended by adding at the end thereof the following: "*Provided further*, That it shall not constitute or be evidence of an unfair labor practice under this paragraph for an employer to establish, assist, maintain, or participate in any organization or entity of any kind, in which employees participate to discuss matters of mutual interest, (including issues of quality, productivity, and efficiency), and which does not have, claim, or seek authority to negotiate or enter into collective bargaining agreements under this Act with the employer or to amend existing collective bargaining agreements between the employer and any labor organization, except that in a case in which a labor organization is the representative of such employees as provided in section 9(a), this proviso shall not apply."

SEC. 4. CONSTRUCTION CLAUSE LIMITING EFFECT OF ACT.

Nothing in this Amendment made by section 3 shall be construed as affecting employee rights and responsibilities under the National Labor Relations Act other than those contained in section 8(a)(2) of such Act.

S. 669, 103d Cong. §§ 1–4 (1993); *see also* H.R. 1529, 103d Cong. (1993).

[133] The stated purpose of T.E.A.M. is to: (1) protect legitimate employee involvement structures against governmental interference; (2) preserve existing protections against deceptive, coercive employer practices; and (3) permit legitimate employee involvement structures where workers may discuss issues involving terms and conditions of employment,

and labor teams which would discuss such issues as productivity, quality control, safety, and other terms and conditions of employment.[134] More fundamentally, H.R. 743 amends section 8(a)(2) by mandating that only employee committees that act in a representational capacity may be found invalid because of an employer's unlawful domination or support.[135]

A. *The NLRA Is Premised on an Adversarial Model*

As a result of the incendiary relationship between management and labor following the Depression,[136] some believe that the NLRA was based on the assumption that this relationship is inherently adversarial in nature.[137]

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to continue to evolve and proliferate. *See* 139 CONG. REC. S4013, S4014 (daily ed. Mar. 30, 1993) (statement of Sen. Kassebaum).

[134] *See* H.R. 743, 104th Cong. (1995).

[135] *See id.*

[136] *See* 78 CONG. REC. 4229, 4230 (1934), *reprinted in* LEG. HIST., *supra* note 46, at 22; *see also* IRVING BERNSTEIN, TURBULENT YEARS: A HISTORY OF THE AMERICAN WORKER 172–73, 217 (1969) (stating that in July of 1933 alone, the number of worker-days lost as a result of strikes was two times greater than the number during the previous six months, and that in 1934, there were 1,856 work stoppages involving 1,470,000 workers); Peter G. Nash, *The NLRA at Age Fifty*, 36 LAB. L.J. 600, 601 (1985) (describing the industrial strife occurring following the Depression that was severely obstructing the nation's flow of commerce).

[137] *See, e.g.*, WILLIAM B. GOULD IV, AGENDA FOR REFORM: THE FUTURE OF EMPLOYMENT RELATIONSHIPS AND THE LAW 121 (1993); Janice R. Bellace, *The Role of Law in Supporting Cooperative Employee Representational Systems*, 15 COMP. LAB. L.J. 441, 441, 458–59 (1994); David H. Brody, *The Future of Labor-Management Cooperative Efforts Under Section 8(a)(2) of the National Labor Relations Act*, 41 VAND. L. REV. 545, 547 (1988) (stating that "[c]ontrary to the contentions of later cases, the Act's drafters did not intend to promote cooperation between labor and management"); Clarke, *supra* note 15, at 2022 ("Under section 8(a)(2), . . . an outside labor organization [is] committed by law to the adversarial model . . . ."); William B. Gould IV, *Reflections on Workers' Participation, Influence and Powersharing: The Future of Industrial Relations*, 58 U. CIN. L. REV. 381, 383 (1989); W. Gary Vause, *Symposium Overview—1992 Critical Issues in Labor and Employment Law*, 22 STETSON L. REV. 1, 6–10 (1992); Martin T. Moe, Note, *Participatory Workplace Decisionmaking and the NLRA: Section 8(a)(2),* Electromation*, and the Specter of the Company Union*, 68 N.Y.U. L. REV. 1127, 1142 (1993); Note, *Labor-Management Cooperation After* Electromation*: Implications for Workplace Diversity*, 107 HARV. L. REV. 678, 681 (1994) ("[T]he statute does, in fact, create an exclusively adversarial model . . . ."); Harold J. Datz, *Employee Participation Programs and the National Labor Relations Act—A Guide for the Perplexed*, 30 Daily Lab. Rep. (BNA) E-1 (Feb. 17, 1993).

However, this assumption has been challenged by commentators[138] and many lower courts,[139] which have attempted to partially uncover the NLRA's "blanket prohibition against any employer-sponsored employee representation plan."[140]

The determination of whether the NLRA was premised on the assumption of an inherently adversarial relationship is crucial in interpreting the NLRA to determine the legality of cooperative management programs, such as teams. If the NLRA were premised on such an assumption, it should be interpreted to invalidate the legality of modern cooperative management programs, and legislation (*e.g.*, T.E.A.M.) which would allow for such programs by amending or revising the NLRA, should be viewed with skepticism. However, as some courts have stated, if the NLRA were premised not on the assumption of an adversarial relationship between labor and management, but rather to promote cooperation between management and workers,[141] then the NLRA should be interpreted to allow for cooperative management programs, and legislation amending or revising the NLRA to permit such programs should be at least considered.

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[138] *See* Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 HARV. L. REV. 1381, 1492 (The adversarial interpretation evolved because of "[w]artime labor policy, the Taft-Hartley Amendments, and post-War administrative and judicial interpretations."); Kohler, *supra* note 22, at 549 ("What Congress originally intended by the provisions of Section 8(a)(2) largely either has been forgotten or become ambiguous through the holdings of influential appellate courts."); Note, *supra* note 137, at 681 ("Whereas employee-employer interests were once seen as mutually exclusive, cultural changes have made employer and employee interests compatible at least some of the time.").

[139] *See, e.g.*, NLRB v. Streamway Div. of Scott & Fetzer Co., 691 F.2d 288, 293 (6th Cir. 1982) (referring to the *Modern Plastics Corp.* holding that "the adversarial model of labor relations is an anachronism"); NLRB v. Northeastern Univ., 601 F.2d 1208, 1214 (1st Cir. 1979); Hertzka & Knowles v. NLRB, 503 F.2d 625, 631 (9th Cir. 1974); Federal-Mogul Corp., Coldwater Distrib. Ctr. Div. v. NLRB, 394 F.2d 915, 918 (6th Cir. 1968); Modern Plastics Corp. v. NLRB, 379 F.2d 201, 204 (6th Cir. 1967); Hotpoint Co. v. NLRB, 289 F.2d 683, 688-89 (7th Cir. 1961); Coppus Eng'g Corp. v. NLRB, 240 F.2d 564, 573 (1st Cir. 1957); Chicago Rawhide Mfg. Co. v. NLRB, 221 F.2d 165, 167 (7th Cir. 1955) ("[C]ooperation between management and labor" is "the principal purpose of the Act.").

[140] Kenneth O. Alexander, *Worker Participation and the Law Once Again: Overview and Evaluation*, 39 LAB. L.J. 696, 697 (1988).

[141] *See, e.g.*, *Northeastern Univ.*, 601 F.2d at 1214; *Hertzka & Knowles*, 503 F.2d at 631; *Federal-Mogul Corp., Coldwater Distrib. Ctr. Div.*, 394 F.2d at 918; *Modern Plastics Corp.*, 379 F.2d at 204; *Hotpoint Co.*, 289 F.2d at 688-89; *Coppus Eng'g Corp.*, 240 F.2d at 573.

The most convincing argument, however, is that Senator Wagner's intent, as reflected in the NLRA, was to preserve a strictly adversarial relationship between management and labor. Four bases support this argument. First, the plain language of the statute unqualifiedly prohibits support to any labor organization regardless of employer motive and organizational wishes.[142]

Second, the NLRA was written and judicially interpreted to make a clear distinction between "employees," who receive protection from the NLRA, and representatives of management, such as "supervisors" and "managers," who do not.[143] "Supervisors" and "managers" have been interpreted to include any worker who uses his discretion or who makes decisions in the interest of the employer or to implement management's policies.[144] Because "supervisors" and "managers" perform these functions, they are excluded from the NLRA's protection. This exclusion assures that management interests and decisions are outside the employees' role in the dichotomy between labor and management.

Third, the legislative history of the NLRA supports the proposition that the NLRA was premised on an assumption of an inherently adversarial relationship between management and labor. The original language of section 2(5) defined "labor organization" as including "any organization, labor union, association, corporation or society of all kind."[145] However, Senator Wagner's fear of scheming employers circumventing this language by establishing employee committees[146] prompted a revision of the Bill to include any "employee

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[142] *See* 29 U.S.C. § 158(a)(2) (1988). This plain language of the statute is even more convincing once the canon of statutory construction applied in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842–43 (1984), is considered. There the Court held that courts may not supply their own interpretation of a statute when Congress has directly spoken to the precise question at issue. *Id.*

[143] *See* NLRB v. Hendricks County Rural Elec. Membership Corp., 454 U.S. 170, 186–87 (1981); NLRB v. Yeshiva Univ., 444 U.S. 672 (1980); NLRB v. Bell Aerospace Co., 416 U.S. 267, 274–90 (1974).

[144] *See Yeshiva Univ.*, 444 U.S. at 672.

[145] S. 2926, 73d Cong. § 4(5) (1934), *reprinted in* LEG. HIST., *supra* note 46, at 2.

[146] Professor Kohler alludes to an interesting verbal exchange between Senator Wagner and a witness that provides insight as to why Senator Wagner feared that employers would circumvent the language of the original Act by establishing employee committees. When giving testimony before the Senate Committee on Education and Labor, Otto Beyer stated, "I would just like to give you this warning—no matter how many unfair labor practices you spell out in this act, you are not going to be very successful in catching the employer in bringing about company unions. There are various devices and ways of doing it." Kohler, *supra* note 22, at 545–46 (citing LEG. HIST., *supra* note 46, at 258). Wagner, skeptical of Beyer's warning, responded that employers had not been "very astute about it so far." *Id.* Beyer retorted, "They will get more astute." *Id.*

representation committee."[147] Thus, had Congress envisioned at least some limited cooperation between management and labor in the form of employee committees, Congress would have excluded employee representation committees outside the scope of the definition of "labor organizations."

Fourth, a final basis of support for the claim that the NLRA was premised on an adversarial model is provided by Justice Brennan. Writing for the majority in *NLRB v. Insurance Agents' Int'l Union*,[148] he stated that labor and management "still proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest. The system has not reached the ideal of the philosophic notion that perfect understanding among people would lead to perfect agreement among them on values."[149]

B. *T.E.A.M. Is Gratuitous*

Supporters of T.E.A.M. allege that its passage is necessary to insure the legality of cooperative plans between management and labor.[150] However, contrary to these claims, section 8(a)(2) does not prohibit a system of cooperative management.[151] In fact, in *General Foods Corp.*,[152] the NLRB held that teams that are "administrative subdivisions" of an employer, reflecting an attempt by management to implement "the best way to organize the work force to get the job done,"[153] do not violate section 8(a)(2). Thus, as mentioned in the NLRB's decision in *E.I. du Pont de Nemours & Co.*, certain unilateral mechanisms, such as brainstorming groups, information sharing, and suggestion boxes constitute permissible labor-management cooperation.[154]

The NLRB also made clear that as long as a team does not act as "a bargaining agent"—or if they do act as a bargaining agent that these actions are "*de minimis* and isolated"[155]—then such teams do not violate section 8(a)(2).[156] Thus, in a unionized setting, as long as management acknowledges that the

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[147] *See* LEG. HIST., *supra* note 46, at 1085, 1086; *see also* LEG. HIST., *supra* note 46, at 1319, 1320 (comparison of § 2926 (73d Cong.) and § 1958 (74th Cong.) Senate Committee Print).

[148] 361 U.S. 477 (1960).

[149] *Id.* at 488–89.

[150] *See* 141 CONG. REC. H9523, H9525 (daily ed. Sept. 27, 1995) (statement of Rep. Stenholm); *id.* at H9526 (statement of Rep. Knollenberg); *id.* at H9529 (statement of Rep. Talent).

[151] *See* H.R. REP. No. 248 at 2–13 (1995); *supra* Part III.C.

[152] 231 N.L.R.B. 1232 (1977).

[153] *Id.* at 1234.

[154] *See* E.I. du Pont de Nemours & Co., 311 N.L.R.B. 893, 894 (1993).

[155] *See General Foods Corp.*, 231 N.L.R.B. at 1235.

[156] *See id.*

union is the employees' representative, some form of labor-management cooperation (*e.g.*, teams) can occur.[157]

The fact that since 1977, there has not been one single case before the NLRB that questioned the legality of teams also casts doubt on the claim by supporters of T.E.A.M. that it is necessary to preserve cooperative management programs.[158] Similarly, according to a study by Professor James Rundle, from 1983 to 1993, the NLRB has issued only seventeen orders requiring an employer to terminate an employer-created employee organization.[159] Interestingly, in only two of these cases was the organization not created to either enervate a union organizing drive or to bypass an existing union.[160] Thus, it appears as if T.E.A.M. is a solution in search of a problem.[161]

C. *The Problem with Teams: Teams Harm Employees*

Regardless of the benefits or defects of T.E.A.M., a more fundamental question merits an answer: Are labor and management teams,[162] which T.E.A.M. would allow, harmful to employees? This query must be answered before passing legislation that allegedly allows for teams because, depending on the answer, there might be little merit in having teams in the first place.

There are numerous flaws endemic to teams that harm workers. First, labor-management cooperation, such as teams, is primarily for the economic benefit of management, thus if the employees' involvement is not implemented fairly, the benefits for employees of labor-management cooperation may never come to fruition. For example, it has been suggested that after implementing

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[157] *See* Kohler, *supra* note 22, at 527.

[158] *See Hearings on Removing Impediments to Employee Participation*/Electromation *Before the Subcommittee on Employer-Employee Relations of the House Economic and Educational Opportunities Committee*, 104th Cong., 27 (Feb. 8, 1995) (statement of Howard Knicely, Chairman of the Labor Policy Association and Executive Vice President of TRW, Inc.).

[159] *See* James Rundle, *The Debate Over the Ban on Employer-Dominated Labor Organizations: What Is the Evidence?*, *in* RESTORING THE PROMISE OF AMERICAN LABOR LAW 161 (1994).

[160] *See id.*

[161] *See Teamwork for Employment and Management Act of 1995 Hearing of the Committee of Labor and Human Resources*, 104th Cong., 61 (Feb. 9, 1995) (testimony of David M. Silberman, Director, AFL-CIO Task Force on Labor Law).

[162] *See supra* notes 21–30 and accompanying text.

teams, employees may simply be asked to work harder and that the company may use the resulting increase in efficiency to reduce the workforce.[163]

Another pitfall of teams is that cooperation between labor and management may be no more than a facade to convince employees that their concerns and desires are actually being addressed by management. Labor unions are generally suspicious of businesses' motives for implementing teams.[164] Also, despite claims of teams "empowering" workers, teams often replace top-down managerial control with peer pressure, a force that is sometimes no less coercive.[165]

Perhaps the most deleterious ramification of teams is that if employees are involved in "managerial" decisions, as they often are in teams, they may lose their protection under the NLRA. The dichotomy between labor and management is central to the NLRA's structure of collective bargaining.[166] As

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[163] *See* BARRY BLUESTONE & IRVING BLUESTONE, NEGOTIATING THE FUTURE 167 (1992).

[164] Their suspicions surface in the following quote:

> The quality of working life and the quality of business ethics cannot be separated. In the private sector, the profit priority motivates most employer behavior, which can be characterized as mean and rationalistic. Management-initiated "quality of life" programs are usually disguised attempts to achieve speedup. . . . [U]nions often regard employee involvement programs as a means of undermining union members' commitment to their unions.

Robert S. Adler & William B. Bigoness, *Contemporary Ethical Issues in Labor-Management Relations*, 11 J. BUS. ETHICS 351, 357 (1992) (quoting AFSCME President Jerry Wurf); *see also* COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, *supra* note 10, at 31. The Commission's report contained the following comments:

> We have deep skepticism toward the notion that workers and management have much in common in dealing with workplace problems. They compete with each other to divide the economic pie, much as companies compete for market share. The idea that they share interests has historically been used to defeat or preempt unions . . . .

Id. (citing Labor Notes, The Independence of Labor (Oct. 1, 1993) (a paper submitted to the Commission 1993)).

[165] *See id.* at 30–32.

[166] *See* Note, *Collective Bargaining as an Industrial System: An Argument Against Judicial Revision of Section 8(a)(2) of the National Labor Relations Act*, 96 HARV. L. REV. 1662, 1677 (1983). The NLRA defines employee, in pertinent part, to include "any employee . . . but shall not include any individual . . . employed as a supervisor . . . ." 29 U.S.C. § 152(3) (1982). The Act defines a "supervisor" as:

one commentator noted, "The Act's definition of employee, employer, and supervisor all assume a strict dichotomy between employees, who are entitled to the Act's protections, and managers, who are not."[167] Even though the NLRA explicitly excludes supervisors from its protections, the managerial exclusion was judicially created in *NLRB v. Bell Aerospace Co.*,[168] where the Supreme Court defined "managerial" employees as "executives who formulate and effectuate management policies by expressing and making operative decisions of their employer . . . ."[169] These discretionary functions are viewed as outside labor's role in the labor-management dichotomy.[170] Thus, the Court held that "managerial employees," who exercise discretionary functions in furtherance of company objectives, "are not covered by the Act."[171]

The Supreme Court expanded the managerial exclusion in *NLRB v. Yeshiva University*[172] by holding that university professors were not "employees" under the NLRA because of the "managerial" aspects of their jobs.[173] The Court held that because professors voted on matters such as class size, academic standards, and curriculum, they "exercise authority which in any other context unquestionably would be managerial."[174] The Court noted that any other

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> any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Id. § 152(11).

[167] Note, *supra* note 166, at 1677.

[168] 416 U.S. 267 (1974).

[169] *Id.* at 286 (quoting Palace Laundry Dry Cleaning, 75 N.L.R.B. 320, 323 n.4 (1947)).

[170] *See* Clarke, *supra* note 15, at 2042.

[171] *Bell Aerospace Co.*, 416 U.S. at 289.

[172] 444 U.S. 672 (1980).

[173] *See id.* at 672.

[174] *Id.* at 686. The Court stated:

> The controlling consideration in this case is that the faculty of Yeshiva University exercise authority which in any other context unquestionably would be managerial. Their authority in academic matters is absolute. They decide what courses will be offered, when they will be scheduled, and to whom they will be taught. They debate and determine teaching methods, grading policies, and matriculation standards. They effectively decide which students will be admitted, retained, and graduated. On occasion their views have determined the size of the student body, the tuition to be charged, and

decision "would undermine the goal [the NLRA] purports to serve: To ensure that employees who exercise discretionary authority on behalf of the employer will not divide their loyalty between employer and union."[175]

These decisions' impact on employee team members may be significant. Teams are specifically designed to give employees more managerial and supervisory tasks and to participate in managerial decisionmaking.[176] The Dunlop Commission stated that some cooperative programs, such as teams, "blur the traditional distinction between supervisors or managers and workers, raising questions about the coverage of employees under the NLRA."[177] If teams convert employees, who receive protection under the NLRA, into managers and supervisors, who are not protected under the NLRA, then this cost of teams alone renders them suspect. Employees, after all, should not be forced to choose between cooperation with management and their statutorily granted section 7 rights.

VI. CONCLUSION

In passing the NLRA, the government attempted to create a system of labor-management relations where employees were represented by their independently selected representatives, rather than by company dominated unions. However, with the advent of cooperative management programs, such as teams, this system is in jeopardy; T.E.A.M. would only threaten this system more.[178] Although the United States economy is certainly functioning now in a

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the location of a school. When one considers the function of a university, it is difficult to imagine decisions more managerial than these. To the extent the industrial analogy applies, the faculty determines within each school the product to be produced, the terms upon which it will be offered, and the customers who will be served.

Id.

[175] *Id.* at 687–88.

[176] *See supra* Part I.B.

[177] COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, *supra* note 10, at 7.

[178] As eighteen Representatives noted:

> Stripped of all the rhetoric, H.R. 743 stands for the proposition that employers should be able to choose and control who shall speak for employees on matters in which the interests of employers and employees are inherently divergent and sometimes at odds.
>
> . . . To use an analogy from American history, it is akin to saying that allowing the British Parliament to choose which Americans would represent the interests of American colonists (and on what issues they would be able to speak) would have provided adequate

global economy, a strategy for facing this challenge should not infringe on the rights of workers granted to them in the NLRA.

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and sufficient representation for Americans. That such a gross contradiction of core concepts of fairness is likely to produce cooperation, or anything other than animosity, is no more likely today than it was in 1776.

H.R. REP. NO. 248, at 40 (1995).